No. 2735.

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT, AT SAN FRANCISCO.

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PACIFIC COAST CASUALTY COMPANY,
*Plaintiff in Error,*

v.

GENERAL BONDING & CASUALTY INSURANCE COMPANY,
*Defendant in Error.*

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Upon Writ of Error to the District Court of the United States for the Northern District of California, Second Division, at San Francisco.

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Supplemental Brief for Defendant in Error.



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## Introductory.

Since our original brief of May 3, 1916, was printed and sent to San Francisco for filing we have received the brief of counsel for the plaintiff in error, and in this supplemental brief we shall make direct reply thereto in paragraphs so headed as to indicate the portion of the brief under consideration in each paragraph. In printing the original brief, we overlooked the rule of this court relative to style of type, and printed it in our usual way. We trust the court will excuse this oversight.

## Page 8.

In the second paragraph on this page it is stated that the Sowders judgment was paid by the defendant in error October 22, 1913, and that the assignment of the policy in suit was dated November 4, 1913. This is true, but it is also true that the assignment was made in pursuance of an understanding that antedated the payment of the judgment (Tr., 105-106).

**Pages 9-10 and 37-39.**

As shown on pages 20-21 of our original brief, this case is prosecuted upon a single cause of action, namely, that in view of all the circumstances the plantiff is entitled to recover from the defendant, on the policy in suit, the sum of money against whose loss the defendant promised insurance. The plaintiff is not suing upon the indemnity agreement executed by Davis in behalf of the defendant, or upon any right resting on subrogation. In the opinion of the district court of Kaufman County, Texas, the plaintiff was entitled to be subrogated to the policy in suit, and therefore it ordered that the policy be assigned to the plaintiff; but the plaintiff's rights of subrogation are merged in the assignment, and are not in question in this case.

**Page 10**

The second specification of error is answered on pages 21-23 of our original brief.

**Page 11.**

The matter complained of in the third specification was not mentioned by the defendant in its assignment of errors, and therefore is not before this court for consideration (Tr., 188-218; rule 11). Moreover the court did not err in overruling the defendant's objection to the letter offered. It was read into the record in response to the defendant's objection to oral testimony of its contents and request that it be produced; and it had the effect of modifying the testimony of the witness. Its introduction was beneficial and not harmful to the defendant.

**Pages 11-12.**

The matter complained of in the fourth specification is also matter not assigned as error, and therefore not before the court. But the objection is not well taken. The letter was written by Mr. Davis, who had been attorney for the defendant in the Sowders case, and who was communicating to the attorneys for the plaintiff in the Sowders case the refusal of the defendant to pay the judgment. It is undisputed that the defendant did refuse to pay the judgment, and there is no denial of its having announced such refusal to its attorney for the purpose of having the same communicated to Sowders.

**Page 13.**

The fifth specification is answered on page 23 of our original brief, in the paragraph numbered 3.

**Page 13.**

The matter complained of in the sixth specification was not assigned as error. The testimony objected to was of the same character as that dealt with in the fifth specification, and so the complaint is answered by paragraph 3 on page 23 of our original brief.

**Pages 14-15.**

The seventh specification embraces the matters included in the fifth and sixth assignments of error, and is answered on pages 23-24 of our original brief.

**Pages 16-17.**

The ninth specification is answered on page 25 of the original brief.

**Page 18.**

The tenth specification is answered in paragraph 8 on pages 25-26 of our original brief.

**Page 18.**

The eleventh specification is answered on pages 26-27 of our original brief, in paragraph 9.

**Page 20.**

The twelfth specification is answered in paragraph 10 on page 27 of our original brief.

**Pages 20-21.**

The thirteenth and fourteenth specifications are answered together on pages 27-29 of our original brief.

**Page 22.**

The fifteenth specification is answered on page 29 of our original brief, in paragraph 12.

**Page 23.**

The sixteenth specification is answered in paragraph 13 on pages 29-30 of our original brief.

**Page 24.**

The seventeenth specification is a duplicate of the fifteenth.

**Page 24.**

The eighteenth specification is answered in paragraph 14 on pages 30-31 of our original brief.

**Pages 26-28.**

The nineteenth specification is answered on pages 7-9 of our original brief.

## Pages 28-37.

On pages 28-30, in the twentieth specification, counsel complain of the action of the court in overruling their motion for a peremptory nonsuit. This complaint is set out in their eighteenth assignment of error (Tr., 211-212), and we have dealt with it on pages 7-18 of our original brief. On Pages 30-37 counsel follow this specification of error with a specification of "the particulars in which the evidence was and is insufficient to justify the decision of the court." These nineteen specifications of particulars, now transferred to the eighteenth assignment of error, relating to the motion for a nonsuit, constitute a part of the nineteenth assignment of error, complaining of the action of the court in overruling a motion for a new trial (Tr., 212-218). As a part of the nineteenth assignment of error we have dealt shortly with them on pages 19-20 of our original brief; but this assignment seems now to be abandoned. Manifestly the district judge was called upon to consider the motion for a nonsuit with reference to the matters therein set up, and to those matters only. If no sufficient reason why the plaintiff should be nonsuited was given in the motion, the district judge did not err in overruling the motion. All these nineteen specifications of particulars relate to findings of fact filed by the court long after the close of the trial, each complaining that some particular real or pretended finding of fact was unsupported by the evidence. Manifestly this has nothing to do with the motion for a nonsuit. We suppose that we might properly stop here; but

perhaps it will be more satisfactory to the court if we call attention to some of the reasons why the complaints made of the findings are not well founded; and we will do this in paragraphs numbered to correspond with the specifications of particulars.

1. The evidence showed conclusively that the defendant's agent Miller-Stemmons Company procured the indemnity contract from the defendant through attorneys Meador & Davis, provided Davis had authority either original or by ratification or by holding out to give the agreement which he did give. The evidence on this subject is stated on pages 2-4 of our original brief, and seems to us sufficient to support the finding of the court upon any one of these three grounds.

2. The only evidence (aside from the letter on page 144 of the transcript, whose recitals are not evidence) regarding the authority of J. F. Seinsheimer & Co. is that they were general agents of the defendant, and that through them the defendant paid the premium of the supersedeas bond by reimbursing Miller- Stemmons Company therefor. Mr. Leeds of the Miller-Stemmons Company testified that he thought he had been authorized by J. F. Seinsheimer & Company to procure the supersedeas bond, and there was no evidence that the defendant ever had communicated either to J. F. Seinsheimer & Co. or to Miller-Stemmons Company its unwillingness to furnish such bond. As we shall show hereafter, it was the duty of the defendant to furnish the bond in protection of its assured, and it was permissible upon the part of both

its general agents and its local agents to assume that the defendant would do its duty. The evidence is fully stated on pages 2-4 of our original brief.

3. The finding complained of is abundantly sustained by the testimony of Leeds that Stephenson agreed to make the supersedeas bond provided an indemnity bond were given by the defendant, and that he procured such a bond through Meador & Davis, and by the testimony of Stephenson that he made the bond on the promise of Davis to furnish an indemnity agreement in pursuance of which promise the agreement shown in the evidence was delivered. This evidence is stated on pages 3-4 of the original brief.

4. The court did not find that Davis was the attorney in fact of the defendant, and nobody except Davis by his signature ever claimed that he was such.

5. The court found that Stephenson was not shown the defendant's letter of June 28, 1912. The evidence presented a direct issue of veracity between Stephenson and Davis on this subject; and the court believed Stephenson and disbelieved Davis.

6. This specification is practically a repetition of the fifth. Stephenson testified that Davis did not tell him that he was without authority to execute an indemnity agreement and did not show him the letter of June 28, 1912. The court believed this testimony, and did not believe the contrary testimony of Davis.

7. Stephenson, testifying with reference to the time when and place where the supersedeas bond was procured, stated that it was customary for attorneys at law to apply for appeal bonds, and that he under-

stood that Davis had authority to do what was done. This is sufficient to sustain the finding of the court that Stephenson dealt with Davis on the supposition that his authority was that which was usual in such cases.

8. The same evidence that sustains the finding complained of in the seventh specification sustains that of which complaint is made in the eighth specification.

9. Leeds testified that he was agent of the defendant at the time the policy sued on was issued; and that the policy was signed by his firm; and that notice of loss was served on him by Sowders and by him communicated to J. F. Seinsheimer & Co., resulting in the defense of the Sowders suit by the defendant; and that he thought he was authorized by J. F. Seinsheimer & Co. to procure the appeal bond; and that he did procure it and pay for it; and that he was reimbursed for the outlay by J. F. Seinsheimer & Co. (Tr., 113-117). The defendant admits (notwithstanding the letter on page 144 of the transcript) that it paid the premium through J. F. Seinsheimer & Co.

10. There is no finding that the company knew that Davis had executed the indemnity agreement, save as the knowledge of Davis and Leeds may be imputed to it. The court did find that Davis and Leeds knew of the transaction, which finding is in accordance with the undisputed evidence. As a matter of law Davis and Leeds are presumed to have communicated this information to the defendant, and there is no evidence that they did not do so.

11. There is no finding of the court that the defendant ratified the giving of the indemnity agreement by Davis. If there had been such a finding it would have been sustained by the evidence that Davis and Leeds, whose information would be imputed to the defendant, knew of the transaction, and that the defendant accepted the benefit of the supersedeas appeal bond, and paid the premium thereon. Having instructed Davis that Elmo Rock Company must furnish its own supersedeas bond, when it was requested to pay the premium for such a bond it necessarily was put upon inquiry as to how and why the bond had been obtained in violation of its instruction.

12. Crumbaugh testified (Tr., 105) that in the conference which took place in the court between himself and the district judge and Mr. Cosnahan it was requested and understood by all the parties that the plaintiff was to pay the Sowders judgment in behalf of Elmo Rock Company, and (Tr., 106) that the plaintiff did finally pay the judgment in behalf of Elmo Rock Company, and (Tr., 105 and 103) that he read very carefully the assignment of the policy and that the recitals therein contained were in accordance with the facts. The assignment recited (Tr., 36) that the plaintiff paid the Sowders judgment at the request of the receiver of Elmo Rock Company, who executed the assignment.

13. The undisputed evidence is that the receiver of Elmo Rock Company, by authority of the court, assigned the policy in suit to the plaintiff; and the indisputable law is that the policy was assignable.

14. The receiver of Elmo Rock Company testified that the property levied upon consisted of land worth $19,000 and encumbered by a lien of $3,500, and of personal property worth $4,000 or $5,000 (Tr., 108). The court's nineteenth finding of fact follows this evidence.

15. There is no finding that Elmo Rock Company was solvent and able to pay the Sowders judgment. But if there were it would be sustained by the evidence of the receiver (Tr., 108 and 111) that Elmo Rock Company owned nineteen acres of land worth $19,000 and encumbered for $3,500, and rock crushing machinery worth $4,000 or $5,000, and that its entire indebtedness was possibly $10,000. This evidence leaves the company solvent, estimating the value of the defendant's indemnity policy as nothing, and assuming that it had no property other than that levied on and the policy.

16. By reason of the Sowders judgment Elmo Rock Company was thrown into the hands of a receiver and its business was stopped, and its property subjected to a lien, and itself to liability for the indemnification of the plaintiff, which paid the Sowders judgment in its behalf. These facts are found by the court; and from them the conclusion follows irresistibily that Elmo Rock Company did suffer loss and expense by reason of the Sowders judgment, though there is no express finding to that effect.

17. What has been said in the last preceding paragraph answers the seventeenth specification.

18. Leeds testified that Miller-Stemmons Company were acting under J. F. Seinsheimer & Co. and that he thought they were authorized by J. F. Seinsheimer & Co., to procure the appeal bond, and that J. F. Seinsheimer & Co. reimbursed them for the premium paid on the appeal bond.

19. There is no finding of fact that it was the duty of the defendant to furnish a supersedeas bond in appealing from the Sowders judgment; but as a matter of law such was its duty.

> Brassil v. Maryland Casualty Co., 147 N. Y. App. Div. 815, 133 N. Y. S. 187; same case, affirmed, 210 N. Y. 235, 104 N. E. 622; E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co., 162 N. Y. App. Div. 842, 147 N. Y. S. 765; Rochester Mining Co. v. Maryland Casualty Co., 143 Mo. App. 555, 128 S. W. 204; American Surety Co. v. Ballman, 104 Fed. 634; same case, affirmed, 53 C. C. A. 152, 115 Fed. 292; Robb v. Security Trust Co., 57 C. C. A. 576, 121 Fed. 460; Rosenbloom v. Maryland Casualty Co., 153 N. Y. App. Div. 23, 137 N. Y. S. 1064.

Twelve of the foregoing nineteen specifications of particulars have to do with matters relevant only to the indemnity agreement executed by Davis in the name of the defendant. The plaintiff is not suing on that indemnity agreement; and it is only of collateral importance as being one of the links in the chain of circumstances leading up to the right of the plaintiff to take an assignment of, and to sue upon, the liability policy issued by the defendant. That right would be

abundantly supported even if the indemnity agreement never had been given, and the validity of the indemnity agreement therefore is by no means an essential element of the plaintiff's case.

**Pages 39-43.**

It is of no consequence here whether the plaintiff was entitled to be subrogated to the rights of Elmo Rock Company against the defendant. The district judge of Kaufman County thought it was, and so ordered the receiver to transfer the liability policy to the plaintiff. This suit is based upon the assignment of the policy, and not upon an equitable claim thereto by way of subrogation.

**Pages 43-47.**

This argument upon what the defendant's counsel say is the chief question in the case has been anticipated and answered on pages 9-18 of our original brief.

**Pages 47-53.**

The plaintiff is not seeking to recover upon the indemnity contract executed by Davis. It set up the contract in its complaint merely as matter of inducement which led it to execute the supersedeas bond and thereby to come into possession of the policy of liability insurance sued upon. The case is not correctly stated. The district court found upon evidence quite sufficient to sustain such finding that the supersedeas bond was executed in ignorance of the limitations placed upon the authority of Davis and in reliance upon his apparent authority. There was no evidence that Davis had a written power of attorney, and no

pretense upon the part of the plaintiff that he was an attorney in fact with authority to execute the indemnity agreement. Our theory as to this collateral matter may be stated as follows.

A principal is bound by the act of his agent not only when such act is within the scope of the agent's theretofore conferred actual authority, but also when another has dealt with the agent in just reliance upon the authority which the principal has caused the agent to appear to have, and also when the agent's act, though originally not authorized either in fact or in appearance, has been ratified by the principal.

With limitations not relevant here, a principal is conclusively presumed to have all the information and all the notice of facts in any way appertaining to a transaction which are possessed by his agent acting for him in that transaction.

The defendant instructed Davis to appeal the Sowders case, but at the same time instructed him that Elmo Rock Company must furnish its own supersedeas appeal bond. By its contract and its action thereunder the defendant had undertaken to defend the Sowders suit at its own expense, and had agreed that the moneys so expended should not be included in the $5,000 limit of liability fixed by the policy, and had bound Elmo Rock Company not to interfere in the legal proceedings. Under the controlling law, execution on the Sowders judgment could be stayed pending appeal only by filing an approved supersedeas bond within twenty days. The defendant had the right to appeal the case, but it had also the concomitant duty

of protecting Elmo Rock Company from the judgment pending the appeal. Under the contract between them it was the defendant's duty, and not that of Elmo Rock Company, to procure and pay for the supersedeas bond. This, of course, included the obligation to do whatever it might be necessary to do in order to procure such bond. For authorities see page 11, ante.

We submit that when the defendant instructed its agent 2,000 miles away to appeal the Sowders case, it thereby authorized him to do in its behalf what it was under obligation to do, and what it was necessary that it should do in order to render the appeal effective. Its accompanying instruction, which was violative of its own contract, that Elmo Rock Company must furnish the supersedeas bond, should be construed as being merely an instruction to get this advantage for it if possible. To make an effective appeal was the primary and fundamental part of the order. To saddle upon Elmo Rock Company contrary to agreement the responsibility and expense of procuring the supersedeas bond was a secondary and incidental part of the order. That which was primary and fundamental was not nullified by the conflict with it of that which was secondary and incidental. "Ut res magis valeat quam pereat" is the rule of interpretation which should be applied even in favor of Davis, and especially in favor of this innocent plaintiff. Upon this ground we contend that Davis had actual authority previously conferred to do all that he did. This court knows, and the trial court knew, that nowadays

appeal bonds usually are made by surety companies upon payment of premium and satisfactory showing of safety, and that ordinarily the attorney at law conducting the litigation acts for his client in obtaining the bond. In this case the evidence shows that such was the regular course of business where and when the transaction in dispute was had. The conflict between Stephenson's testimony and that of Davis having been decided in the plaintiff's favor, we have a case of action in good faith and without notice of secret instructions upon faith of the authority usually possessed, and which therefore the defendant caused Davis to appear to possess. Moreover Leeds, the recognized business agent of the defendant, cooperated with Davis in getting the plaintiff to make the bond, and paid the premium thereon, thus adding to the appearance of regularity in the negotiation.

Davis and Leeds both knew that the plaintiff had made the supersedeas bond, and had done so in consideration of the payment of a premium by the defendant and of the execution by the defendant through Davis of the indemnity agreement. Their knowledge is conclusively imputed to the defendant, whether its officers in San Francisco had or did not have information regarding it as a matter of fact. There is, however, no evidence, (for the letter on page 147 of the transcript is not evidence) that these officers did not receive the immediate and full report which Davis and Leeds ought to have sent them. With such knowledge imputed or actual, or both, the defendant availed itself of the bond made by the plaintiff, prosecuted the appeal

with stay of execution, and paid the premium for the bond. Thereby it ratified the action of Davis and Leeds in procuring the bond, and in procuring it by the means adopted.

Whatever the court may think of Davis' authority to bind the plaintiff by an express contract of indemnity, we believe it cannot doubt that the defendant, through Davis and Leeds and by ratification of their act, not only consented that the plaintiff make the bond, but even induced it to do so, and so in law requested it to pay the judgment in behalf of Elmo Rock Company with right of indemnity from Elmo Rock Company, and of subrogation to and assignment of the judgment, execution lien and employer's liability policy. The plaintiff is no volunteer, no meddler, no speculator in lawsuits. It merely is doing the best it can in a legitimate way to get partly out of the trouble into which it got through the inducement of the defendant.

**Pages 55-63.**

Here counsel recur to their contention that the plaintiff is not entitled to recover because the Sowders judgment was not so paid as to render the defendant liable. This subject has been sufficiently discussed on pages 9-18 of our original brief.

**Page 64.**

Leeds was not merely a soliciting agent. The policy in suit was signed by his firm, whose managing

partner he was, and the defendant does not dispute the validity of that policy.

Respectfully submitted,

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Eugene P. Locke,

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Dallas, Texas,

May 19, 1916.